

No. 81043-5

Chambers, J. (dissenting) — Four years ago, after examining the facts of this case, Commissioner Tracy G. Waggoner found that John Corbin had made a sufficient showing that he was M.F.’s de facto parent to allow his petition to go to trial. Shortly afterward, Judge Eric Z. Lucas firmly rejected the contention that *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), does not apply to stepparents. So should we. We should give Corbin the opportunity to prove what he has alleged; that he is her de facto parent under Washington law.

The majority frames this case as “whether a stepparent may acquire de facto parent status when the child has two fit parents.” Majority at 3. First, this statement of the issue assumes at least two things that have not been established: first, that a child can have no more than two parents; second, that both of M.F.’s parents are fit. The first assumption is at odds with *L.B.* itself, where the child’s natural father was never found to be unfit; the second is questionable based on the record before this court. Because Judge Lucas properly understood that there is no unspoken stepparent exception to our opinion in *L.B.*, I respectfully dissent.

Briefly, Corbin was M.F.’s stepfather for most of her life and is the father of her two brothers. After Corbin and M.F.’s mother divorced, the fatherly relationship continued, with the ongoing support of M.F.’s natural

father. M.F. generally accompanied her brothers when they went to Corbin's house, where she had a bedroom and a close relationship with her new stepsisters. This state of affairs persisted for three years after the divorce until the day M.F. arrived at Corbin's house bruised in intimate places, apparently from being "tickled" by her mother's new boyfriend. Corbin and M.F.'s natural father were furious that this man had touched her in such a way. Based on that and other similar events, M.F.'s therapist became concerned enough that this new boyfriend was grooming her for sexual abuse that he made a report to the State. Shortly afterward, M.F.'s mother pulled her from therapy, and shortly after that, again supported by M.F.'s natural father, Corbin filed a petition to become her de facto father. According to M.F.'s therapist, Corbin is M.F.'s de facto father and losing him from her life would have a devastating impact on her psychological health and her ability to form healthy relationships. M.F.'s mother moved to dismiss the petition essentially on the ground that a stepparent did not have standing to bring it. The trial court denied the motion, and a court commissioner found that Corbin made a threshold showing that he was M.F.'s de facto parent. There is a trial court order in the record finding that M.F.'s mother's behavior is causing actual detriment to her children. There certainly are allegations of unfitness in this record; a motion for nonparental custody under RCW 26.10.030 would not tax the imagination.

Turning to the law, I disagree with the majority's characterization of

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*L.B.* as this court “fashion[ing] a remedy to fulfill the parties’ agreement” in light of “the lack of a statutory remedy.” Majority at 4. *L.B.* was not about contract law. Instead, *L.B.* was about

whether our state’s common law recognizes *de facto* parents and, if so, what rights and obligations accompany such recognition. Specifically, we are asked to discern whether, in the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme, or conversely, whether our state’s relevant statutes provide the exclusive means of obtaining parental rights and responsibilities.

*L.B.*, 155 Wn.2d at 688 (footnote omitted). We concluded that the statutes did *not* prove the exclusive means of obtaining parental rights and responsibilities. *Id.* at 707. In the four years since *L.B.* was announced, the legislature has expressed no discontent with that holding. Thus, the proper question is not whether anything in the elements we set forth in *L.B.* necessarily preclude a stepparent from filing a *de facto* parentage petition. The question is whether Corbin has made a threshold showing of those elements. Under *L.B.*, Corbin is M.F.’s *de facto* parent if he can show:

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a *de facto* parent is “limited to those adults who

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have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.”

*Id.* at 708 (internal citations omitted) (quoting *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d 1146, 1152). Nothing in those factors precludes a stepparent from filing a de facto petition. In this case, the commissioner found that Corbin made a prima facie showing on each of those factors. We should let this case go to its conclusion.

The majority asserts that a statutory remedy exists here. RCW 26.09.240 does allow a nonparent to petition for visitation, but we held that statute unconstitutional in *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 66, 109 P.3d 405 (2005). The majority cites to chapter 26.10 RCW, but there is no mechanism in that chapter for a de facto parent’s rights to be formally recognized. RCW 26.10.030 does permit a nonparent to petition for custody, but that remedy is only available if “the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” RCW 26.10.030. Corbin is not, at this point, alleging that the mother is not a suitable custodian, though there are certainly facts in this record that could support such a petition. *See In re the Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008). Further, taking the majority’s logic, though not its explicit language, *L.B.* was incorrectly decided because RCW 26.10.030 was available at the time. RCW 26.10.100, cited several times by the majority, simply says that “[t]he court shall determine custody in accordance with the best interests of the child.” It says nothing about

determining parentage.

Corbin is not asking for custody; he is asking to be allowed to establish that he is M.F.'s parent. As the Court of Appeals wisely noted in rejecting its own opinion in *M.F.*:

More fundamentally, residential placement is not equivalent to parental status. The nonparent custody statute and the de facto parent doctrine have very different purposes. A nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time, because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.

Parenthood comprises much more than mere custody. A parent has a fundamental liberty interest in the care, custody, and control of his or her child. One who meets the rigorous test that defines a de facto parent stands in legal parity to an otherwise legal parent, and therefore is vested with the same parental rights and responsibilities, limited only by the best interests of the child. The nonparent custody statute cannot provide an adequate remedy to one who meets the stringent de facto parent criteria.

*J.A.B.*, 146 Wn. App. at 426 (footnotes omitted) (citing *L.B.*, 155 Wn.2d at 708, 710). I agree. Aside from the now-repudiated Court of Appeals's *M.F.* opinion below, I have found no case that limits the de facto parent doctrine the way the majority would today.

We defined de facto parent in *L.B.*:

*De facto parent*: Literally meaning “parent in fact,” it is juxtaposed with a legally recognized parent. Black's [Law Dictionary 448 (8th ed. 2004)] (defining *de facto* as “[a]ctual;

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existing in fact; having effect even though not formally or legally recognized”). We are asked in this case to define the parameters of this term and in doing so, find that it describes an individual who, in all respects functions as a child’s actual parent, meeting the criteria suggested herein.

*L.B.*, 155 Wn.2d at 691 n.7 (alteration in original). That definition does not say “except for stepfathers.” Corbin has made a prima facie showing that he qualifies. For M.F.’s sake, he should be given the opportunity to prove his parentage.

I respectfully dissent.

AUTHOR:

Justice Tom Chambers

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WE CONCUR:

Justice Susan Owens

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Justice Mary E. Fairhurst

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